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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

RICHARD DENT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	**NO. C 14-02324 WHA**
	)	
NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,	)	
	)	
	)	
Defendant.	)	
	)	

San Francisco, California
Thursday, October 30, 2014

TRANSCRIPT OF PROCEEDINGS

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Reported By: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

Thursday - October 30, 2014 **8:39 a.m.**

P R O C E E D I N G S

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THE COURT: All right. Now we go to Dent v. National Football League, 14-2324.

Okay. Who do we have? Let's go.

MR. RUBY: Good morning, Your Honor. Allen Ruby for the NFL.

MR. NASH: Daniel Nash for the NFL.

THE COURT: Welcome.

MR. GRYGIEL: Steve Grygiel, Your Honor, for the plaintiffs.

THE COURT: Welcome.

MR. GRYGIEL: Thank you.

THE COURT: All right. We are here for -- let's see, what are we here for? Motion to dismiss. And I am mainly interested in the Section 301 argument. There's no way we've got the time to go through all of your arguments, but we will go through them in the order; but the 301 is where you can help me the most.

And I'm going to give you time eventually to tell me -- uninterrupted time, brief perhaps -- to tell me anything else you want, but let me tell you what's on my mind on the 301.

Here we have a lawyer who's not the union; right? You're not the union?

MR. GRYGIEL: Correct, Your Honor.

THE COURT: There is a union, and the union is the one that's supposed to be looking out for the players.

So is there anyone here from the union out there?

(No response.)

THE COURT: I want the lawyers to get some -- I want a brief by next week from the union what they think about this lawsuit.

To my mind, there's this problem: You are -- one way to look at this is that the plaintiffs' lawyer is a buttinski, to use an old phrase, a buttinski. The labor union is supposed to be doing this. The labor union is the one that's supposed to be looking out for the players.

They've got this long complicated collective bargaining agreement, and here you come along and say, "Well, they're not doing a good enough job. I'm going to sue apart from -- apart from what the union has done, I want to sue."

Well, I'd like to know, what does the union even think about that? Maybe you know. Tell me.

MR. GRYGIEL: Well, Your Honor, that's actually part of my case. That's precisely the point.

THE COURT: Well, what is your point?

MR. GRYGIEL: That the union doesn't represent the former players. When you look at the thousands of pages that the NFL put forward with all the collective bargaining

agreements over these great many years, you will see that the definition of the NFL PA as the exclusive bargaining unit of the NFL players becomes more finely reticulated over time. The one thing that doesn't change, it starts out with basically two qualifiers: Current and future players.

THE COURT: Okay.

MR. GRYGIEL: And then it --

THE COURT: Here, I've got copies of some of these agreements, and I tried hard to figure that point out, and you may -- you possibly are right. So I'm looking at the current -- it says "Preamble" here. See that part?

MR. GRYGIEL: Yes, indeed, Your Honor.

THE COURT: So walk me through that and explain to me why your clients are not bound by this agreement.

MR. GRYGIEL: Our clients are not bound by this agreement, Your Honor, for a number of reasons. Let me start with them chronologically.

The CBAs under which they played have clearly expired by their terms if one reads -- and that's all you need to do is read, not interpret -- the CBAs that the defense has put forward.

Number two, if they had known of their claims at the time that they were covered by a CBA, maybe then, arguably, they could have grieved them. They could also have brought independent state law claims pursuant to the *Caterpillar* and

Lingle doctrine that just because the same facts give rise to a collective bargaining agreement grievance that might also support a separate independent state law claim for a tort, doesn't mean you have preemption.

But to answer your question squarely, the former agreements have expired; and during the time these players were covered by the former agreements, the cause of action, as we allege factually with facts that need to be taken as true for a 12(b)(6), were fraudulently concealed from them.

THE COURT: All right.

MR. GRYGIEL: Now we get to the current -- I'm sorry, Your Honor -- we get to --

THE COURT: All right. So you're telling me something that I hadn't focused on properly; and this is my fault, not your fault.

It does say, "Preamble," it says: (reading)

"The Players Union exclusive bargaining unit described as follows:"

Then it says: (reading)

"1. All of the professional football players employed by a club."

Number 2, and this is the one that I wanted you to address: (reading)

"All professional football players who have been previously employed by a member club of the NFL who are

seeking employment with an NFL club."

So I guess your answer to that is, well, your clients are all retired and they're not seeking employment. I don't know.

MR. GRYGIEL: That's precisely it, Your Honor.

THE COURT: All right.

MR. GRYGIEL: And I knew you were going to go there, Judge, because I pulled out all these preambles myself when we were first here and Your Honor asked that question, which is an important question. Just what is it that the NFL has done to put itself in the seat of a defendant here?

Leaving aside the duty question for the moment and focusing solely on the CBA definitional issue that Your Honor has raised, there is nothing in these CBAs that requires any interpretation, merely reading. And what it shows is that the retirees are not covered by the current CBA; and that while they were under CBAs, the claims that they would bring are not covered by the CBA in terms of preemption and they were fraudulently concealed from them at the time anyway. So they're not under any CBA.

THE COURT: All right. I understand what you're saying. I'm not saying I agree with it, but possibly. I've got to think about it.

Okay. Now, I want to look at the one that was previous to this 2011 agreement. Which one -- is that 1968? Where would it be? What would be the -- I guess mine are in the wrong

order here.

MR. GRYGIEL: Bear with me, Your Honor. I'm looking through my list of -- I pulled a bunch of them out.

THE COURT: All right.

(Pause in proceedings.)

THE COURT: Oh, I see. All right. The next one --

MR. GRYGIEL: The 2002-2008 agreement?

THE COURT: No. I've got 2006-2012 agreement. It says "NFL Collective Bargaining Agreement 2006 to 2012."

All right. So are you there?

MR. GRYGIEL: I'm not, Your Honor, but I think I know it.

THE COURT: All right. Well, let me hold up what I've got. I don't know --

MR. GRYGIEL: Okay. That looks very familiar.

THE COURT: All right. So now that one says sort of the same thing really. It's got the same definition.

MR. GRYGIEL: That's really part of my point, Your Honor, is that in a collective bargaining agreement that grew in density and complexity and thoroughness over time never did anything in all of those many years -- and there was a gap period which the defendants acknowledge in the footnote in their brief -- but they never did anything to say that the issues in our case are covered in any material way by this collective bargaining agreement.

These retirees are not covered by the agreement *ab initio*, and the claims aren't covered. In fact, our claims arise from a separate duty outside the CBA that has nothing to do with CBA for purposes of any need.

THE COURT: Well, wait a second.

All right. So -- all right. So let's say, for the sake of argument, that the current CBA or really none -- let's assume for the sake of argument that no CBA purports to cover a retiree. Let's assume that for the sake of argument.

Nonetheless, the other side will come back and say -- I'm going to let them speak for themselves in a minute -- but they will come back and say, "Well, okay. Maybe that's true; but at the time that they played and got injured, the CBA did address that." True?

MR. GRYGIEL: The CBA covered the players, Your Honor. The CBA was applicable to them for the subjects that were addressed in the CBA way back then, but those subjects do not include the claims that we have brought in this case.

In fact, the NFL has been at pains in its briefing, as Your Honor will have seen, to say, "What are you suing us for? It's the clubs. Look at all these provisions in the CBA. The club has a duty to provide a doctor. The club has a duty to allow players to inspect their medical records twice a year for purposes of grievance. The club physicians have a duty to tell the players anything that the club physicians have told the

teams about the players' fitness to perform." They're at pains to say it's all about the clubs not about the NFL's separate and independent duty.

And the question then, I think, comes -- and actually preemption analysis quite clearly, I think, at the end of the day turns on this -- what's the source of the duty? From where does the duty hale on which the plaintiffs in this case anchor their claims?

And it anchors in a number of places. Number one, it anchors in the law. It anchors in the question of the foreseeability that gives rise to a duty. California law recognizes it and has since the baseline cases of *Rowland*.

THE COURT: Well, wait. Wait. Wait. I'm going to ask the other side to pay close attention to this because then I'm going to turn to you and say, "Where did the -- for the time period that they did play, and so forth, where was that particular thing preempted?"

All right. But let's pause on that for a second.

All right. So let's just take Mr. Dent since he's the first one. When did he play? Which one of these agreements was he under?

MR. GRYGIEL: He was covered by the one previous to the current one. That's my memory.

THE COURT: The one I was just looking at?

MR. GRYGIEL: That's right.

THE COURT: Okay. So during that -- just to take him as -- one at a time, what state was he living in? Who did he play for?

I'm sorry. I'm not -- I do not do Fantasy Football. I don't know -- I go to one game every 10 years, so I'm not an expert on this. So what game -- who did he play for?

MR. GRYGIEL: I know at one time he played for the Bears. And I'm a huge sports fan, Judge, but I confess -- sorry -- I am not a huge pro football fan.

THE COURT: Let's say it's the Bears.

MR. GRYGIEL: Okay.

THE COURT: So that's in Illinois.

MR. GRYGIEL: Okay. All right.

THE COURT: All right. So what is this law that you're coming up with that would have said -- let's put the agreement to one side because you don't rely on the agreement. So what is the law that says that the league itself has got some duty to the player to make sure that the team properly takes care of him?

Ordinarily I would think that everyone's got to get their own doctor; and if Mr. Dent got hurt, he would go see his own doctor. But the club might on its own say, "Okay. We're going to provide you with a doctor." All the better. But where does the law come from that says the League has got to make sure that the club is taking good care of the players?

MR. GRYGIEL: The law comes, Your Honor -- and I believe every one of the 50 states in the country since *Palsgraf* has held this -- that the core of the duty arises from the foreseeability precept; and the foreseeability precept is that if it is foreseeable that the consequences of an act from an actor who is in a relationship with another actor -- as the NFL clearly is with the players, the NFL is clearly in a relationship with the players and some of the NFL's own materials demonstrate that relationship -- if it's foreseeable that the NFL did not take due care with respect to the pharmaceutical program that we allege was illegal within the scope of our Complaint, if they didn't take due care to make sure that players only received medications on the basis of diagnoses, informed consent, and with fair risks of the warnings and toxicities and side effects of these drugs, that they breached the duty.

It comes from the common law concept of foreseeability anchored, I think, no more clearly than one can express it than in *Palsgraf*. California has done it in the *Rowland versus Christian* case. Federal courts in California have said the same thing. It's a foreseeability question.

But we don't need simply to anchor our duty in the amorphous concept of, well, it's in the common law. We have the NFL's own actions, which we have pled in this Complaint to demonstrate the NFL understood it had a duty.

If Your Honor were to look at paragraphs 219, I believe, and 220 of the Second Amended Complaint, there we have the Chargers and Cardinals head trainers telling players, named plaintiffs in this case, that the NFL from on high, outside of anything having to do with the collective bargaining agreement, imposed a requirement.

What was that requirement? The requirement was that players who wanted to get Toradol, a pain masking agent, had to sign waivers. Well, you wouldn't be requiring that players sign waivers unless you thought that you owed a duty to those players and that your breach of that duty might somehow lead to liability you find inconvenient for you.

THE COURT: The waiver waived claims against who?

MR. GRYGIEL: The clubs, Your Honor, only against the clubs. I would love to be able to say it specifically referred to the NFL. I've looked at it. It doesn't.

Now, I'm sure what would happen. The NFL would say, "We're a third-party beneficiary of that agreement because we're all for one and one for all for certain purposes."

But leaving that aside, for the duty question, how is it -- and I think the answer is they couldn't, unless they thought they had a duty -- how can the NFL come in and say, "We want you to sign these waivers," and it is done at their behest and the players then are signing those waivers if they want to get Toradol?

Paragraph 210, I believe, of the Complaint, Your Honor, we allege that approximately 10 years ago the NFL undertook itself unilaterally to start taking a better control over the administration, storage, procurement of pharmaceuticals putting it under the aegis of the National Football League's security office.

Beyond that, the NFL also secured the services of an outfit called Sports Farm, again to get better control of the pharmaceutical process that we allege at the core of the case violated the federal Controlled Substances Act and the Food, Drug and Cosmetic Act, as well as state cognates.

But, again, the point, Your Honor, to bring it back to duty, is that those facts, which we allege in the Complaint and that must be taken as true, demonstrate that the NFL itself understood it had a duty. In fact, we know that during the gap period when there was no CBA, which the NFL alludes to in its Complaint, doctors were also provided. There were also trainers there. Idea being that everyone understood these people had a duty.

THE COURT: You mean this was when there was a strike or something?

MR. GRYGIEL: Yeah. There was -- I'm sorry, Your Honor. I shouldn't say "yeah."

Yes. There was a period, I believe it was between 1998 and 2003, when there was no agreement. I might have those

years wrong. But the NFL has put it as, I think, their second footnote in their brief about when there was a gap year because they use it to make the point that, well, at least at some point all of the players were under a CBA. We don't have any quarrel with that.

I mean, my view, frankly, Your Honor, is for preemption, to bring it back to the fundamental issue Your Honor is concerned about, that even if today every one of these players was covered by this CBA, if there was a fifth paragraph in that definition of the bargaining unit and it said all retirees like Jeremy Newberry, like Richard Dent, like Ron Stone, they're all covered, our argument would be, Your Honor, they are -- those claims are still not preempted because they do not arise from any provision of the collective bargaining agreement.

And the NFL doesn't contest that. The NFL nowhere says that the first prong of preemption applies, the *Allis-Chalmers* first test that preemption arises out of a claim that is based on an agreement, a specific provision in a contract, a contractually funded right.

THE COURT: Okay. We're going to come back. I want to give the other side a chance to respond too.

What I would like for you to begin by is explaining the -- coming to grips with counsel's point, which is that he's not suing on any rights that are conferred by the CBA. In fact, his clients aren't even members of the union. They are not

part of the collective bargaining unit. So what do you say to all that?

MR. NASH: Let me start with the retiree point. Counsel's fundamentally wrong as a matter of federal labor law. Retirees -- all of the plaintiffs here are making allegations about medical care that was provided to them while they were part of the bargaining agreement, while they were subject to the CBAs that we've cited. There's no dispute about that. We're not talking about claims that might have arisen after they retired.

As a matter of fundamental labor law, parties who are subject to a bargaining unit and a collective bargaining agreement have rights and they retain those rights after retirement. The easiest example is the plaintiffs here all have numerous rights, even today, under the collective bargaining agreement for certain retirement benefits. There's retirement plans. There are even disability benefits that we've cited in the CBA that covers the kinds of injuries that they're complaining about here.

Those benefits and those rights don't go away simply because it's either -- that they retire, and the law is quite clear on that.

What I think counsel is confusing is the basic point that under Section 9(a) of the NLRA, the union represents the bargaining unit. And in the Supreme Court's decision in

Pittsburg Plate Glass, they said once people retire, they no longer represent them for purposes of ongoing matters.

THE COURT: Well, usually when something gets preempted, some state law claim, or whatever, gets preempted, there is -- in its place there is a federal claim. So what is the claim that Mr. Dent now has against the NFL? What is this? I mean, you must concede it, or are you just saying there is no claim?

MR. NASH: What I'm saying, Your Honor, is that the claims that he has asserted here in tort cannot be resolved without interpreting the CBA.

THE COURT: I don't accept that. You're not answering the question. What you're trying to say is he's out of luck.

MR. NASH: No, I'm not.

THE COURT: All right. So what is his remedy?

MR. NASH: He is complaining about, essentially, deficient medical care. I don't think there's any dispute that his --

THE COURT: What is his remedy?

MR. NASH: There are various remedies under the collective bargaining agreement. If --

THE COURT: Tell me what those are.

MR. NASH: Well, there --

THE COURT: What is his best remedy for what's being alleged here under the CBA?

MR. NASH: Well, the parties have negotiated various rights and benefits. I just mentioned one of them. There are specific benefits for players who have suffered disabilities as the result of drug addiction. There are numerous provisions in the CBA that the players who played under that CBA, even after retirement, may pursue. The Supreme Court has made clear they can file grievances.

THE COURT: But they've got bigger claims than that. Where are the provisions of the CBA, assuming it applies, that would cover the claims that are being asserted here?

MR. NASH: Well, Your Honor, 301 preemption, and the Supreme Court has made this clear, does not depend on the plaintiff having the availability of the specific state law claims or even the specific state law remedies that they're seeking in the lawsuit that they filed. The Supreme Court made that clear in *Caterpillar*. That is not a requirement for preemption.

And, in fact, let me address -- let me address the claims this way, because at the end counsel said that the NFL doesn't say that the claims here arose under the CBA as in *Allis-Chalmers*.

Actually, this case is almost identical to *Allis-Chalmers* and to your point, Your Honor, your point earlier, that normally you would think the players would go to their own doctors and the NFL and the clubs wouldn't even have anything

to do with that.

Well, here we have a collectively bargained agreement that provides them the right to medical care. That's the source of the duty. The obligation to provide medical care by the clubs exists only because of the CBA; and in that respect, whether you call it arose under, whether you call it, as the Supreme Court talks about it in *Allis-Chalmers*, the right originated or is rooted in the CBA, there's no question that all of their claims focus on medical care provided by club doctors and trainers.

That medical care, the duty to provide that medical care, as the *Jeffers* court said, exists only because of the CBA. And it's not just that they have to provide the medical care. The CBA defines the standards of care that are to be done on the very issues that they're complaining about.

So, for example, one of their fundamental complaints is about the return to play, and they allege that somehow the NFL -- although when you read the Complaint, it's clear it's the doctors, it's not the NFL -- the doctors and the trainers gave medications to return players to the field in a manner that was inconsistent with their medical interests.

Well, the CBA expressly addresses that. It says that medical care is to be provided -- the manner of the medical care is to be provided in accordance with the club doctor's best medical judgment. Not the NFL's medical judgment, but the

club doctor's. So the fundamental duty to provide the medical care here arose from the CBA.

Now, getting back to your question about the remedies, and let me use the Toradol example that they just cited. They're alleging that somehow someone from the NFL told the club doctors that they should use waivers and releases before administering Toradol.

Well, we know -- you asked the question about, "Where's the players union?" Well, the players union does have a duty to represent the players here. The players union, in fact, has represented them vigorously for many, many years on these very subjects, including, including the specific example that counsel just cited.

We have Exhibit 19 to our motion, which they don't contest, was a grievance filed by the Players Association over this very Toradol issue. And what the union said there is that -- first of all, they didn't allege that the NFL was directing it. They said the doctors were using it. And under the CBA, the doctors had to stop, and the NFL has obligations under the CBA to make sure the clubs follow the CBA. The NFL needs to tell them, "Don't to that." But those are all rights that clearly arise under the CBA. They clearly require contract interpretation.

And under the *Allis-Chalmers* decision -- Your Honor, there's a lot of cases cited in the briefs, but I would submit

to the Court that really the beginning and the end of the analysis is the Supreme Court's decision in ***Allis-Chalmers***. This is a classic case, a classic case of Section 301 preemption, and ***Allis-Chalmers*** says that. You can't just come in and allege a tort over rights that are rooted in a collective bargaining agreement that essentially challenges the manner in which those rights are provided and say it's a tort and distance yourself from the CBA.

THE COURT: So let me give you a hypothetical for a second. Let's say that a player is playing and gets hurt in a game, and the club -- I'm not saying this is really what happened, I don't know if it happened -- but let's -- the club says to the doctor, "You've got to get this guy out there. We need him. He's our best passer or our best receiver."

And so they dope him up, and let's just assume that it's completely bad -- meaning bad medicine -- bad -- no doctor in their right mind would do this, but the club puts pressure on the doctor; and the doctor goes along with it, dopes him up, sends him out there, and let's say the guy dies. He dies right there on the 50-yard line because he shouldn't have been out there in the first place.

So the first question is: Could there be a lawsuit brought against the doctor for malpractice?

MR. NASH: I think there may very well could be, yes. In fact, I can tell you --

THE COURT: 301 wouldn't stop that; would it?

MR. NASH: Under those facts, it very well may not.

THE COURT: All right.

MR. NASH: And there have been suits against doctors by players.

THE COURT: All right. So I'm going to take that "very well may not" as no problem with agreeing there.

All right. So what if that same lawsuit joined in the club saying the club put him up -- put the doctor up to it, would that be barred by 301?

MR. NASH: It would, and many cases have so held.

THE COURT: Really?

MR. NASH: And we've cited them in our briefs, Your Honor.

THE COURT: I am amazed.

MR. NASH: Well, the reason is because the club's responsibilities -- the CBA places these decisions with the club doctor to begin with. If the player wants to hold the club responsible, then you have to interpret the CBA provisions to ascertain the club's responsibilities by interpreting the very provisions under which the care was provided under the CBA. And many cases have held that, and we've cited them in our briefs. *Jeffers* --

THE COURT: Well, let's say that all the CBA says -- it doesn't here, but in my example -- is that the club agrees

to provide -- have a doctor on site to assist the player and says nothing about the standard of care, nothing.

So then the club gets sued and says, "Well, you've got -- you know, there's something in there about this, in the CBA about this, so it's preempted." And so, therefore, there is no lawsuit against the -- they didn't violate anything. They didn't violate the CBA because it doesn't say what you're supposed to do. It just says, "We'll provide a doctor." Well, they did provide a doctor. Then they put pressure on the doctor, but the CBA didn't expressly prohibit putting pressure on the doctor.

So what would be the answer to that kind of a problem?

MR. NASH: Well, our CBAs always have prohibited clubs from doing that. That's the simple answer.

THE COURT: But you're not -- you see, but maybe there are other examples whereby a hypothetical would apply, so what would be the answer to my hypothetical?

MR. NASH: Well, Your Honor, I don't know how to answer that because we have CBAs. And, again, this gets back to your original question about the players union. The hypothetical that you just addressed is something that has been foremost in the mind of the players union and a subject of bargaining for many, many years.

And the CBA, through numerous provisions that we cite -- what you're essentially saying is there's a conflict there.

The club may want to get the player back on the field. We understand the cynical argument about that and we understand the allegation, but the players union has been representing the players in these kinds of -- again, for these kinds of interests for years.

There are provisions that we cite that if -- on return to play, return to play, if a doctor is going to clear somebody to return to play and he, to take your hypothetical, tells the owner or the general manager, "You know, if he goes back there, back on the field, he's going to get really hurt," well, under the CBA, he has an obligation to provide a written notice to the player of that before the player can be put on the field. Under the CBA, the player has a right to a second medical opinion.

The union has not been sitting by idly, Your Honor. For many, many years, there are -- the Joint Committee on Health and Safety, this has been a constant subject between the Players Association and the League on behalf of the clubs to make sure that these issues are addressed in the collective bargaining agreement.

Now, to be clear, and to go to your hypothetical, we are not arguing, as they suggest we are, that the mere fact that there is a CBA provision that says you have to provide a doctor is necessarily enough for preemption. We're not saying that merely because this is the subject of bargaining, it's not --

it's preempted. We know that the Ninth Circuit has said that's not enough.

But what we are saying, and what is demonstrably the case, is that these CBAs comprehensively address all of the issues that Your Honor is talking about; and I would submit, respectfully, that the issue that you are concerned about was something that the union was concerned about years and years and years ago, and that's why we've been negotiating all these provisions.

But let's get back to the NFL away from the club. They're not suing. I mean, they purposely have not sued the club. Now, I'm assuming it's because they know there's so many cases that say if they did, it would be preempted. I'm assuming it's also because they know workers' compensation exclusivity would likely bar a claim like that for workplace -- for the workplace injuries that they're seeking. So they're trying to reach over the clubs to sue the League, and they're doing it in tort, in common law sort, either negligence or fraud.

And their affirmative case in both of those areas of claims require them to demonstrate that the NFL had a duty to supervise the medical care, to provide the warnings that they talk about. It's either a duty of care or a duty of disclosure. And you cannot possibly resolve that without -- and the Supreme Court has talked about this in numerous cases, particularly in *Allis-Chalmers*. You can't sue in tort over the

manner in which a right provided in the CBA is carried out without implicating the very CBA terms that are -- where the right has arisen from.

And here there is no way to determine whether the NFL had a duty to do the things that they say. And just to be very clear about it, if you read the Second Amended Complaint, it's very long, but if you look at the specific allegations, it's no question it's about what -- the medications provided by the doctors and trainers.

And just look at the -- I think it's the 10-named plaintiffs. They each have the same boilerplate allegation. They say the following: They say, "During my career, I was provided injections and pills for various medications by club doctors and trainers," not by the NFL. And then in the next sentence they say, "No one from the NFL ever talked to me about it."

So their claim here is that we had some sort of duty to talk to them about the dangers of medication. We had some sort of duty to second-guess the doctors' medical judgments and tell them what warnings they should give, or whether or not they should give them a particular drug. That duty, first of all, couldn't possibly be resolved without interpreting what the League's responsibilities are, including the many provisions that we cite.

But more to the point, if what we -- if what they say is

true, that somehow the League did that, let's say someone from the League office called up a doctor and said, "I want X player to be on the field, and you better give him a drug," that, Your Honor, would be a claim like in *Allis-Chalmers* that clearly arose under the CBA because that would be a violation of the CBA, and they would have a right to file a grievance.

There are other rights, by the way, and this is why I think this is such a compelling case for preemption. It's not just the basic right to have a club doctor. It's not -- it's also the standards of care, but it's the many other provisions that talk about how the union and the League get together and constantly study these things and come up -- the union has rights to process arbitrations. If the League adopts a playing rule that the union thinks is going to endanger player safety, they have a right to commence a special arbitration procedure to block that rule.

So it's simply not the case -- and I understand counsel wants to come in here and say, "Well, I'm not suing under the CBA, and our rights are just under state law or under the laws of various states"; but what *Allis-Chalmers* and the Supreme Court have said is, "You can't do that." You can't -- because this right didn't exist absent the CBA.

THE COURT: Go back to something we talked about a few minutes ago, and that is: How do you get the retirees under these -- this definition? I'm still not -- I don't follow

that.

MR. NASH: The test for preemption is whether a collective bargaining agreement needs to be interpreted in resolving the claim. The plaintiffs' allegations all involve conduct that occurred while they were subject to the collective bargaining agreement. We cite cases for this. So this was true in the *Atwater* case in the Eleventh Circuit.

THE COURT: So do all of these agreements have this comprehensive -- let's go back to the one in 1968. Where's the provision about medical treatment and all that?

MR. NASH: I don't have the specific -- there's a provision on player rights and medical care.

THE COURT: Is there?

MR. NASH: Well, first of all, there's an NFL constitution provision that we cite that goes back before 1968 that sets forth the standard of care, and it says -- and it's in -- and the constitution is incorporated into the CBA; and under many cases, that's considered part of the CBA.

And the constitution has always said that the return-to-play decision that they're complaining about here needs to be decided by the club doctor according to the club's doctor's medical standards, not by what the League says, not by what somebody else says, but by the club doctor; but the duty to provide the club physician is in all of the CBAs.

THE COURT: Well, I'm looking at the earliest one that

I have, which is '68, I believe. It's kind of hard to tell the date. But where is that provision they need to provide a doctor? Where is that in that one?

(Pause in proceedings.)

MR. NASH: I'll get that for you.

(Pause in proceedings.)

MR. NASH: It's in 1982. I don't know that I have the cite for the '68. It goes back to at least 1982. If you give me a moment, I'll get --

MR. GRYGIEL: I can give it to you. I've got it right here.

MR. NASH: Okay. Great.

(Pause in proceedings.)

MR. NASH: I believe it's in the player contract that was negotiated as part of the CBA. I don't know if it's attached to the draft that you have here.

(Pause in proceedings.)

MR. NASH: Well, it's definitely in the constitutional provision that we cite in the brief.

THE COURT: Well, so are you saying that for any and all purposes the constitution is part of the CBA?

MR. NASH: It is, and the CBA says that expressly.

THE COURT: Okay.

MR. NASH: But the point, Your Honor, is that there's no question that there's nothing that they can rely on outside

of the CBA that would impose on the League any of the duties to provide the medical care in the first instance.

So I come back to --

THE COURT: But let me go back to the other side for a moment. Now, you used the *Palsgraf* case, and I know the *Palsgraf* case, Justice Cardozo and Ms. Palsgraf and the train station; but the law is very clear that -- let's say you have -- you have many kind of business relationships; and if somebody fails to act and even knows that their failure to act is going to result in injury to somebody else, that doesn't, under *Palsgraf*, impose some duty to intervene.

MR. GRYGIEL: Your Honor, let me answer that.

THE COURT: I disagree with that whole theory if that's your theory. So, to my mind, I'm asking -- this is what counsel was saying, and I tend to agree, that the entire duty on the NFL as opposed to the clubs, if there is a duty, comes from these agreements and not from some common law duty. So address that again, please.

MR. GRYGIEL: Your Honor, let me begin -- I heard an awful lot, and I'm not sure I wrote all of it down, that with which I take quarrel.

Let me start with the first proposition. If you're going to attack my Complaint, attack the Complaint that I wrote. I didn't write a Complaint for medical malpractice, and I didn't write a Complaint for vicarious liability of the League for

what the doctors did or didn't do. I alleged that the NFL itself as an independent actor with an independent duty breached its duty to the players.

Now we get to that question, Your Honor, where does the duty come from.

THE COURT: But what is that duty?

MR. GRYGIEL: And the duty comes here: Let's use the Ninth Circuit case of *Cramer versus Consolidated Freightways*, a case that was conspicuously absent from the NFL's opening brief, even though it's controlling Ninth Circuit law and set the doctrine of preemption straight in the Ninth Circuit.

And here's what happened there, Judge. If you'll indulge me, let me tell you about the case because it's important before I get to why *Allis-Chalmers* isn't this case at all.

In *Cramer*, we had an employer who had video cameras behind two-way mirrors. He had them in the men's room and he had them in the ladies dressing room. And why? Because he didn't want the truckers out there on the roads allegedly under the impairment of drugs, or alcohol, or anything else.

In that case, there were two provisions in the collective bargaining agreement. One -- that are relevant. One dealt with video surveillance of the employees. The other dealt with the employer's ability to enforce and monitor drug rules against the employees.

Unlike in our case where no CBA says anything about the

medications, no -- and I never got an answer to the question, and Your Honor didn't either, about what grievance procedure these retirees would have.

But unlike in our case, in *Cramer* you had two provisions that were very close in terms of the subject matter with which they dealt to the basic state law claims that the employees made.

Now, what did the employees do? They didn't sue for -- their union for breach of the duty of fair representation. They didn't sue the employer under the collective bargaining agreement. They filed suit on the basis of two sources of common law rights: Number one, the California constitution, a right to privacy; number two, California common law privacy rights.

What did the Court say? The Court said, spying in the way that this employer did is per se illegal; and when you have per se illegal conduct and it foreseeably has an impact on people, those people are entitled to bring a claim because that illegal conduct itself is the source of the duty. No one can delegate the ability to act illegally.

The point I'm making, Your Honor, is that *Cramer* lays out -- and we have a negligence per se claim that follows directly off of *Cramer* -- *Cramer* lays out very clearly two really important points here: Number one, the undertaking of its acts with respect to the medications, which we allege in

the Complaint, our Complaint, nothing to do with medical malpractice, nothing to do with return to play. Those are simply motives of the NFL for doing what it did. They're not part of the claim. They're simply suggested motives.

What *Cramer* shows is that a duty can arise outside of a collective bargaining agreement; and contrary to what my friend says, simply because there's some overlap of the subjects, that doesn't mean anything for purposes of preemption, nor could it, because in *Lingle*, the Supreme Court said you can bring -- and *Caterpillar* for that matter -- you can bring exactly the same kind of a grievance on exactly the same kind of facts that you could bring an independent state law claim on; and you, as the master of the Complaint can choose, because you, not the defendant, are the one who controls the pleading.

THE COURT: Well, but what is the theory, the common law theory, against -- you say per se negligence -- against the NFL, and how do you -- where does that come from?

MR. GRYGIEL: We get there this way, Your Honor: First of all, we get there from the Complaint. We allege that the NFL knew that these drugs were being essentially provided and improperly stored in a pharmaceutical free-for-all, that they knew that. That they owed a duty to the players, a duty arising from the knowledge, the commonsensical inference. And it doesn't take anything more than that to know that people would be hurt if they would be given these toxic medications --

Toradol, lidocaine, Vicodin -- without the appropriate warnings and medical care.

Number three, the NFL knew full well when players were getting these drugs, they were getting them along the following lines, "Here. Take this." Not, "Take this with the following set of recommendations." Not, "Take this with the following panoply of risks it may entail." No. What they got was simply, "Here. Take this." We're talking about medical care. A player is fully entitled to rely on what that player is given.

Now, what the defendant says is, "Well, Judge, again, that's the doctors. That's medical malpractice." No, it's not. Our negligent misrepresentation and our negligence hiring claims make clear it's about the League's own duty to the players.

THE COURT: Well, but you call it a duty, but let's assume that the League, NFL, knows what you just said. Now, let's assume that, and let's say we have no CBA in the process because we're not dealing with the CBA.

So what if they know? Where does it say in the common law that in those circumstances, the NFL is supposed to swoop down on the club and intervene in that situation?

MR. GRYGIEL: It comes from here, Your Honor, in the common law. The NFL makes its money off the backs, the brains, and the bodies of the players. That establishes a relationship

every bit as much as the agency relationship you see in many of the cases that the defendants cite. There's even an employer-employee relationship for some fundamental tort aspects. I don't have to have a particularly direct contractual relationship, or any contractual relationship at all, in order to owe somebody a duty.

The NFL makes its money off the players. When you turn on the television and you see NFL productions, the first thing you see is a player.

THE COURT: How about the networks? The networks make money. Lets say the networks know this is going on. Do the networks have a duty to protect the players that they're making money off of?

MR. GRYGIEL: The networks, Your Honor, don't have the ability to control the medical process that the NFL did and one that the NFL obviously exercised its rights.

THE COURT: You can say, "We're not going to do business with you guys. You're hurting those players and we're not going to put you on TV anymore." So they do have the ability to -- economic ability.

MR. GRYGIEL: Well, they have the economic ability, but they don't have the same duty because they're not in the same relationship with the players.

THE COURT: You call it duty, but I'm trying to figure out where this duty comes from.

So the clubs are all joined together in the League. I get that part. But that -- and under your assumption, they know that the players are being mistreated. And for our purposes, we have to ignore the CBA, totally ignore it.

So I question whether the League has a duty to intervene to stop a club from mistreating a player.

MR. GRYGIEL: And --

THE COURT: And give me -- there must be -- I mean, give me a decision on point that says that.

MR. GRYGIEL: Here's the most immediate one I can give Your Honor. It's not quite the point Your Honor is looking for, and I'll get to that, but this is the *McNeil* case in the Eastern District, I believe, of Missouri. It was one of the NFL antitrust cases. And in that case -- I brought copies if Your Honor is interested -- in that case, Commissioner Tagliabue then filed a declaration, and he filed a declaration with the court for purposes of trying to preserve the nonstatutory antitrust exemption that the NFL seeks to preserve.

And what did he stay? He said the NFL is a single economic entity, a unified economic actor. Well, if that's the case -- with 32 co-owners -- if that's the case, the NFL, as an entity, has every bit the same responsibility to the players that the defendant here is saying that the clubs do.

THE COURT: That's a good jury argument.

MR. GRYGIEL: Well --

THE COURT: That's a great jury argument, but that doesn't --

MR. GRYGIEL: Well, Your Honor, that's why --

THE COURT: You're not coming to grips with my question, which is, even if the League knows that a given club is mistreating a player, where, other than the CBA, is there some common law or statutory duty to intervene and stop the mistreatment?

MR. GRYGIEL: Let's take, for example, California law, just to use as an example.

THE COURT: All right.

MR. GRYGIEL: *Rowland versus Christian*, 1968. The first question: Foreseeability. Is it foreseeable that harm will come to the plaintiff? Given Your Honor's postulate there, the answer is, yes, it's foreseeable; and foreseeability is almost always the prime determinate of duty.

Second, what is the degree of certainty of that proffered injury? Quite high. If you are sticking players without anything more than a my-say-so-take-it with medications, controlled substances, the likelihood of an injury is quite high. That's why the Hippocratic oath exists. We cite that, of course, in our Complaint in the AMA ethics opinions.

The third point: What is the nexus between the defendant's conduct and the injury suffered? Well, if we take

Mr. Tagliabue at face value and the NFL's most recent Complaint against Governor Christie in New Jersey in which they say the NFL is owned -- I believe they say, "We're a collection, essentially, of 32 teams. The NFL is controlled by its 32 teams." Well, if that's the case, the NFL and 32 teams are seamlessly one and they have a duty to the players.

But, again, the point is: Is there a nexus between the act and the injury? And the answer is yes.

Fourth, what is the moral blame attached to the defendant's conduct? Well, here we suggest quite high. I admit, Your Honor, a jury argument but it is a fact in analyzing duty under California law under the ***Rowland*** case.

What is the moral blame? The NFL is in a position, as we've alleged, of superior knowledge, superior resources, has been at this a very long time, is well aware of the Tokish Study that we report, well aware of the Cottler Study, well aware of the Matava Report, the NFL Physicians Report that studied the use of painkillers in the League; and, therefore, the blame for not doing something when they have the power to do it, as we've seen from their imposition of the Toradol releases, the moral blame is quite high.

Next, what's the burden on the defendant from the duty imposition? Here, just don't do it. Stop doing it. And we know, for example, when the NFL decided to get releases on Toradol, it did it at the drop of a hat.

We also know from -- it's not in the Complaint because we've been investigating the case after, obviously, we filed -- we know from trainers that what the NFL did was to require teams to get pharmaceutical licenses. In other words, if you're going to be buying all these drugs in bulk, you better get a license and comply with the law. Again, extra, outside of CBA conduct showing the NFL's ability to control the action, which underscores the duty.

Next, what's the consequences to the community from imposing a duty? Oh, I don't know. You end up with players who aren't as beat up as they are otherwise.

The next thing you end up with in terms of factors, the seventh one is the availability, cost, and prevalence of insurance for the risk involved. I don't pretend to know the answer to that, but I know the NFL buys a lot of insurance.

The point being, Your Honor, there are standard statutory and common law tests for duty. I can go on. We've got the Northern -- the Ninth Circuit in the *Geurin versus Winston Industry* case: (reading)

> "The existence of a duty turns on the foreseeability of the consequences of an act; that is, duty exists where the risk of a harm occurring is a foreseeable consequence of the actor's behavior. The risk of harm imposes on the actor a duty to act in such a way as to minimize the harm from that risk."

That's precisely what we're saying here. It's almost to me, Your Honor, inconceivable that the NFL, which touts itself as one with the players for some purposes, can then stand up in court and say, "I don't have a duty to protect them," the very people who produce the billions that roll in the door.

Now, to answer another question, when I heard, for example, that ***Allis-Chalmers*** is just like this case, I had to marvel. Now, Your Honor, I don't mean to make a jury argument, but I studied this pretty hard. I've got an outline of ***Allis-Chalmers*** right here. Let's just take a couple examples.

There the plaintiff was a current employee. The plaintiff was covered by a CBA. The CBA dealt directly with this grievance. The right at issue came directly from the contract, and the contract was a labor agreement.

What we had there was a claim for bad faith handling under a disability plan. The disability plan was specifically included in the CBA. You will look in vain through these CBAs for anything dealing with the medications. The Joint Committee on Player Safety is no such thing.

The policy concerning drugs in this particular -- any of the CBAs doesn't deal with the medications at all in its very terms. We briefed that.

Suffice it to say, that one of the cases the defendant briefed and relies on, ***Stringer***, itself says that the Joint Committee on Player Safety doesn't get anywhere towards

preemption. It's simply a hortatory body that can discuss and recommend but has no power.

Back to *Allis-Chalmers* on which the defendant hangs its hat.

THE COURT: I want you to finish your point, but I have a question for you. You have an amazing ability to speak without ever taking a breath.

(Laughter)

THE COURT: So I need at some point -- I'm running out of time here.

MR. GRYGIEL: You've been talking to my wife, Your Honor?

(Laughter)

THE COURT: I don't know. Maybe she says the same thing.

MR. GRYGIEL: She does.

THE COURT: All right. So let me ask you this question, and this is on the common law duty that you would require. So let's go back to our hypothetical. Let's say the League knows that various clubs are mistreating players, and so the NFL higher-ups have a meeting and they say, "We've got to do something about this. You know, we don't want our players being mistreated."

So they're sitting around the room and they say, "What do we do about this?" So one person raises their hand and says,

"Well, let's bring a lawsuit against the club and tell them we're going to kick them out of the League."

And somebody else says, "No, no. I've got a better idea." They raise their hand and say, "We're going to -- we're going to have a collective bargaining agreement where we give the players some rights, some medical rights. We're going to negotiate with the union, and we're going to force it on the clubs via the collective bargaining agreement."

So they say, "That's a good idea." So they go and they negotiate, and they come up with a compromise; and maybe it's not perfect, but that's what they come up with.

So it's not quite as clear-cut that the League sits back and does nothing. The League does go and negotiates and tries to get some provisions in the CBA that would protect the players from mistreatment.

So having tried that and having gone down the path of trying to protect the players against mistreatment by negotiating for their protection, and so does the players union, now we see this body of law out there that Congress has passed that says, "We want to give a lot of deference to the collective bargaining process; and that, in our industrial society, is where we're going to allow that process to be the machinery."

It seems to me that what you're doing is trying to impose -- to keep a pure system -- assuming we were to find a

duty, and I'm not sure about that part, but let's assume that in a pure system we would have a duty out there, common law duty. Doesn't that have to give way and just evaporate in light of the fact that we do have a CBA that does address it and tries to prevent the mistreatment? And maybe it's not perfect, but it's a decent step in the right direction.

So why isn't that the answer, that the NFL is not as guilty and bad as you make them out to be? The NFL has tried to do something. That's why there's all these provisions in the CBA.

Okay. I've gone on and on. I want to give you a chance now to -- that's the main policy argument that the other side makes that I think has some validity to it. So you get to address that.

MR. GRYGIEL: Let me react to that directly, Your Honor. Every single case from basically *Teamsters*, *Lucas Flower*, *Charles Dowd Box Company*, all of the cases that are the source of the 301 preemption doctrine -- which, despite what the defendant wants to say, is still a sensible acorn as the Supreme Court said in *Livadas*, not a mighty oak -- all of those cases say that one of the requisites for preemption to apply is that it has to promote fundamental labor law goals, three.

Number one, it's got to promote uniformity of interpretation of CBA terms. We don't want different courts, state and federal, all over the country making a different hash

over what a particular term means; whether you get paid for donning and doffing your gear in the locker room or you get paid for it on the assembly line. Uniformity of terms.

The second thing that is at issue is to preserve the ability of labor arbitration in the goal of labor peace. We don't want to say that labor arbitration should always be given way to court actions.

The third thing that's at issue is you want to make sure that plaintiffs don't simply restyle CBA contract claims as tort claims. And the best analysis I can give you, Your Honor, on that, without wasting any more breath with my penchant for doing that, I'm never that grateful to my opponents, but in their reply brief they cited a 1991 case from the Fourth Circuit, completely inapposite, called ***McCormick versus AT&T***, but the dissent in ***McCormick*** by Judge Phillips is absolutely brilliant. I highly commit it to Your Honor.

Having read that and seeing how the court lines up basically ***Allis-Chalmers*** and lines up underneath that the ***Hechler*** case on which they also rely, which shows that when a duty comes from the CBA, it's one thing and when it doesn't, it's another, and the ***Rossin*** case, and then over on our side of the table ***Lingle*** and ***Livadas***, which show that even if the CBA relates to terms in a common law claim, there is still no preemption.

But the point I'm making, Your Honor, is here what is the

threat to labor peace if my clients can't -- if my clients take their case to State Court or to Federal Court? They couldn't sue their union if the union -- as you've seen, the union is not here -- they couldn't sue their union for breach of the duty of fair representation because the union doesn't represent them. We still don't have an answer to how it is that a retiree is subject to this collective bargaining agreement or any other one.

I heard the case *Atwater*. Entirely different. *Matthews*. Entirely different. *Atwater* was a case, Your Honor, in which the player contract and the CBA said, "Okay, you guys, when you retire, we're going to help you with your future retirement planning. Mind you, we're going to put together a list of people who might be good financial advisers, but you rely on them at your own risk." So you had a CBA-created right. The plaintiffs lost a couple million bucks investing with Ponzi schemers -- I guess no surprise there -- and they brought a claim; and the argument there was that was covered by the CBA even though they were retired. Well, yes, there was a direct provision directly on the point that created the right and gave scope and measure to the duty.

Matthews. The defendants cite that, I believe, at page 4 of their reply brief, saying that retirees are subject to the collective bargaining agreement. *Matthews* doesn't say that. *Matthews* didn't address that, neither do any other cases they

talk about. None of them are on anywhere close to all fours, all threes, with this case.

What Matthews involved was simply a question of whether or not California law applied to the workers' compensation case that the former football player had undertaken, and the question was: Was it that or the law of Tennessee, which is contract set?

But, again, there you had a right rooted in the contract. Our whole point, Your Honor, is that we're not suing on a right rooted in the contract. The *Burnside* case, the *Balcorta* case -- these are Ninth Circuit cases that appear nowhere in the NFL's opening brief because they basically say their preemption argument can't possibly work -- those cases say the same thing; that even if you have a subject that relates tangentially, even sometimes more directly, to the elements of a claim that is brought under state law, if you don't need to interpret any particular provision of the CBA, those claims are not preempted.

And that makes perfect sense because when you think about preemption, as Judge Phillips did in the *McCormick* dissent, if you think about preemption in terms of essentially fostering what is essentially a fairly narrow labor law goal, it makes sense that preemption wouldn't sweep as broadly as the defendant wants it to sweep.

And in our case what they would say is the plaintiffs are

essentially left without a remedy. They close their briefing with saying, "Oh, no, they're not. They can grieve it." Through what bargaining representative? Precisely how? They're not represented by the NFL PA.

When you look, Your Honor, at the question of how do you interpret the CBA, which we heard an awful lot of, what we didn't hear was any recognition at all that *Balcorta* and *Burnside* and *Cramer* all reject what they call the straining of a tangential or remote relationship, or even more than tangential, between a CBA provision and a particular state law claim.

We interpret, to quote *Balcorta*, we interpret the word "interpret" narrowly. It has to mean more than "refer to." It has to mean more than "apply."

THE COURT: All right. I need to bring it to a close. I'm going to give each side now -- you get five minutes. You'll get maybe three more minutes. Then I've got to bring it to a close, and I'll try not to interrupt you.

So you get five minutes to bring up anything you want.

MR. NASH: Thank you, Your Honor.

Let me start with the last point and the point that counsel started with. He said that we didn't cite the *Cramer* case, which is governing here, in our moving papers. We actually did at pages 1 and 7 and at page 4 in our reply.

We agree that *Cramer*, the en banc decision is applicable

here. We embrace *Cramer*. We are not arguing, as they continue to suggest, that the mere fact that a subject -- that a topic could be a subject of collective bargaining or a collective bargaining agreement would need to be consulted like in *Livadas*.

And in *Livadas* that he keeps talking about and in *Burnside*, you're talking about whether you just have to look to a CBA to calculate damages under an independent claim, and that's not really interpretation. I think he just agreed, though, when interpretation is required, even under *Cramer*, and certainly under *Allis-Chalmers* and the Supreme Court decisions, the claim has to be preempted.

I was interested to hear that he just said he's not -- they're not seeking to hold the NFL vicariously liable for the doctors. Then I don't know what they're doing. Because if you read the Complaint, whether you call it malpractice or something else, there is no question that the factual basis for their Complaint is the medications that were plainly provided by club doctors and physicians, and what the doctors and trainers, the club doctors and trainers, what the medical team at the club told the players about the medications.

It's not only throughout their Complaint, you only need to look at their opposition to the other motion that we filed on statute of limitations grounds where we press them about the details of their Complaint; and they say things like, "The NFL

failed to exercise due care, care in the hiring and retention of team doctors."

But they also say, the Second Amended Complaint alleges that the doctors and trainers were employed by and agents of the NFL, and that the doctors and trainers acted on the NFL's behalf and under its control.

Clearly they're seeking to hold the NFL vicariously liable under some sort of agency theory. And, again, you can't possibly resolve that claim without interpreting the CBA provisions that say it's the club that has the responsibility to retain the doctors, as well as the other -- many other responsibilities in the area of medical care.

They talk about the duty, that it arises from our knowledge, and I think Your Honor articulated this quite well. Whether we have knowledge generally about whether a particular drug is dangerous, as he said, we're talking about the medical care that the doctors provided.

And he's claiming that we knew what the players were given. Well, actually, Your Honor, under the collective bargaining agreement, we're not entitled, as a League, to get in the middle of the doctor-patient relationship. We're not entitled to tell a doctor or supervise a doctor and dictate what medication should be provided to a player. It's all over the CBA, and we've cited it in our brief.

And if we did, if we did -- and, again, using the Toradol

example that they raise -- that would be a claim arising under the CBA. And he said he didn't hear what grievance a player could file. We put one in the record that they don't dispute about Toradol. The Players Association has filed a grievance over the very subject that they're complaining about here, the administration of one of the key medications that they're complaining about.

And as far as this idea that we had a duty to stop the doctors from providing a particular medication, so if you accept their argument that we knew generally that some medications might be dangerous and we should have stopped that, well, again, you'd have to look at the CBA as to whether we -- not only did we have that duty, but could we -- under the CBA, what could we do about it. And, as I said, the Players Association, if they were here, would certainly say that a grievance could be filed.

Finally, Your Honor, he talked about *Allis-Chalmers* and tried to distinguish it. Again, he keeps talking about the retirees. There's no question that the NFL PA -- if the NFL PA were here, they would say, if a retired player comes and says, "I have a claim that occurred while I was employed by a team subject to a collective bargaining agreement, and I want you to represent me," they have an obligation, they have a duty of fair representation under the National Labor Relations Act to represent him.

The key case, it's a landlord case, it's the *Nolde Brothers* case from the Supreme Court, and it says the mere fact that the player is no longer subject to a collective bargaining agreement doesn't mean that his grievance goes away, or that he no longer has rights that accrued while he was working under a CBA.

And when you think about it, that makes perfect sense because if what he says is true, that would mean any retirement who worked -- retiree who worked under a collective bargaining agreement, the employer could just say, "I'm not going to give you your pension anymore that you earned under your collective bargaining agreement," and you can't do anything -- the union couldn't do anything about it. Well, of course, the union could.

THE COURT: All right. Three minutes.

MR. GRYGIEL: Three minutes, Your Honor.

First of all, yes, there was a current grievance going on between the NFL PA and the NFL concerning Toradol. Who's the NFL PA representing? Current players. Still nothing to gainsay the dispositive fact in this case the retirees are not covered by that CBA and they could not have brought their claims before it. There's no getting around that.

That brings me to the second point that's in the second brief here.

THE COURT: So just a second. So you're saying that

as soon as somebody -- let's say that there is -- that there's an active player, and the player feels that his rights are being violated under the CBA and is thinking about doing a grievance and he's still an active player. So while he's an active player, I assume everybody would agree he can bring a grievance through the union.

But let's say he's on the verge of retiring and does retire, goes off on a nice vacation, comes back a month later and says, "Now I'm going to pursue that grievance." I can't believe you would be taking the position that he cannot go to the union and grieve that same grievance.

MR. GRYGIEL: He may be able to, Your Honor, but what your example --

THE COURT: No. Give me a straight answer. Are you going to say that your clients could not grieve something like that?

MR. GRYGIEL: The answer is, yes, Your Honor because California, like most states, follows what's called the last element accrual law.

We're not suing for the injuries that the NFL wants Your Honor to think we're suing about. I'm not suing for the fact that these players got hit on the field and here we are 15 years later saying, "Oh, now it hurts." It's only in 2014, as we state in our new supplemental answers to interrogatories, that the players realize, not just the fact of injury, they

realize not just the damages from injury, but they realize the causal mechanism of injury.

THE COURT: You're not answering my question. In my hypothetical, the player knows good and well that there's a grievance. It's fully accrued. It's only been one month. No statute of limitations bars it. The only thing is they're no longer a member -- they're no longer active. They're a retiree.

Is it really your position that a retiree cannot grieve a grievance through the union, or the union would refuse to represent them?

MR. GRYGIEL: If the injury occurred while he was playing and he's aware of that, I believe the answer might be yes. The short answer is, Your Honor, I really don't know.

THE COURT: Well, then --

MR. GRYGIEL: It's a fairly tricky question because, as far as I can tell, the CBAs don't cover retirees, and I've looked at it very carefully. They just don't.

THE COURT: All right. I interrupted you. I'm going to give you one more minute, then I've got a request for you all, and then I've got to go on.

MR. GRYGIEL: Okay. The final point I'd like to make, Your Honor, in terms of the pleadings here, we're here on a Rule 12(b)(6) motion; and a case that didn't get briefed, which I think is the controlling Ninth Circuit law on this issue,

what do the plaintiffs have to say, it's not proof in the pleadings, essentially it's what Your Honor said in *Talada versus City of Martinez, California*, for their Rule 882 claims, it's notice pleading.

As *Twombly* said, as long as the plaintiffs plead facts sufficiently plausible to generate a reasonable inference that discovery will produce evidence of a required element, that suffices.

Right after that, Your Honor, two paragraphs later in your opinion you then cited in full the *Conley versus Gibson* test that *Twombly* reformulated but did not reject.

Under *Star versus Baca*, has the plaintiff here sufficiently put the plaintiff on notice of their claims for 882? Of course. Look at the briefing. They know full well that with which they're charged. Their argument is, "It's somebody else's fault. We're not liable. It's preempted."

But you couldn't make those finely reticulated arguments about the need to interpret a CBA unless you fully understood the nature of the claims.

As for 9(b), the test is clear. Can the NFL in the position of receiving the allegations we've made form a defense that's more than just, "I didn't do anything wrong"? Are they on notice of the sufficient particulars of the alleged wrongdoing to frame a defense that's more specific than that? And, again, Your Honor, the answer is yes.

We satisfied the notice pleading test, we have appropriately alleged the duty, and we've alleged the breach of the duty and when it occurred. Therefore, Your Honor, I believe, it seems to me, that we're entitled to go forward to discovery on these claims.

THE COURT: All right. Here's my request to you all. I would like to get the views of the union. I would like you both to write, or e-mail, or telephone and tell the union general counsel that the judge would like to have the answer to some questions from the union; and then if the union doesn't respond, I'm going to let you take their deposition to find out what their position is. So they can either do it the easy way or they can do it the hard way, but I want to know.

And here are the questions, and that is: If a retiree goes to the union and says, "I want to grieve the type of injuries that are alleged in the Complaint," would the union be obligated to pursue that grievance; or is it true, alternatively, that as a retiree, the retiree is not part of the collective bargaining unit and has no rights to grieve anything? That's one question.

And the second general question is: If it were to be grieved, would the collective bargaining agreement cover the types of claims that are being asserted?

So, you know, just a 10-page brief would be fine. Now, what I'd like for them to do is to let me know -- what is

today? Thursday? -- let's say by Wednesday at noon to just let me know whether they're going to do it. They can send me a letter. They don't have to write the brief by next Wednesday, but they can send a one page letter saying, "Dear Judge: We got your request. Too bad. We're not going to respond"; or they could say, "We will respond, and we will respond hopefully, you know, like two weeks later."

If it's going to be a long period of time, then I'm going to ask you to go take their deposition pronto. I want to know what their answer is to my mind that the union is part of this situation, and they may -- I don't know what their view is. I've had them in other cases. I've had the union in other cases so I know they litigate all the time. So, presumably, they can answer this question.

So please ask them to tell me if they're going to respond to my request for their input by next Wednesday, and then I would like to have a response at least within two weeks thereafter.

Now, I don't like waiting to decide something, but I would like to wait on that much. I don't have an answer for you today. I'm just going to leave it there; and if they do respond, of course, I will give you a few days to then -- to critique their response so each side would have an opportunity to respond to their response.

All right. It's a most interesting problem. I thank

counsel for an excellent job, and see you soon. Okay.

MR. GRYGIEL: Thank you.

MR. RUBY: Your Honor, may I ask a question, please, through the Court?

THE COURT: Yes.

MR. RUBY: I wonder if I may inquire, when will a transcript be available? We'll order it immediately. I think the union should have the full flavor of everything that was said this morning.

THE COURT: Well, can we do it pronto, like today?

(Discussion held off the record.)

THE COURT: Let's shoot for late tomorrow.

All right.

MR. RUBY: Great. Thank you.

THE COURT: Thank you all.

MR. GRYGIEL: Thank you, Your Honor.

(Proceedings adjourned at 9:53 a.m.)

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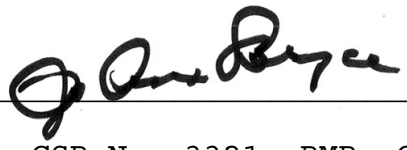
CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, October 31, 2014



Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter